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No. 87-2114

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1988

LUIS RODRIGUEZ AND RAUL REYES, PETITIONERS

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a violation of the Jencks Act, 18 U.S.C. 3500, is subject to the harmless error standard on appeal.
2. Whether petitioners are entitled to a new trial based on government misconduct.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-12a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on February 22, 1988. A petition for rehearing was denied on April 29, 1988. The petition for a writ of certiorari was filed on June 27, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Nevada, petitioners were convicted of conspiracy to distribute cocaine and to possess cocaine with the intent to distribute it, in violation of 21 U.S.C.

846. Petitioner Rodriguez was sentenced to 15 years' imprisonment, and petitioner Reyes was sentenced to 10 years' imprisonment. The court of appeals affirmed (Pet. App. 1a-12a).

1. The evidence at trial showed that petitioners were members of a narcotics conspiracy that imported approximately 89 kilograms of cocaine into the United States from Bolivia. Petitioner Reyes furnished vehicles that were used to pick up the cocaine and provided counter-surveillance during the transfer of the narcotics. Petitioner Rodriguez assisted in providing counter-surveillance and also supplied money for plane and pilot expenses incurred in delivering the cocaine. Pet. App. 1a-2a, 9a-10a.

2. Following their conviction, petitioners moved for a new trial, contending that the government had violated the Jencks Act, 18 U.S.C. 3500, and this Court's decision in *Brady v. Maryland*, 373 U.S. 83 (1983). In particular, petitioners claimed that the government had failed to disclose a transcript of the grand jury testimony of Eugene Bustos, a government agent who had testified at trial. The district court denied the motion. Although it recognized that the grand jury testimony at issue involved a "separate and distinct" offense and that the failure to produce it was "inadvertent and not in bad faith," the court agreed that the government had violated the Jencks Act. 12/11/85 Tr. 4. The court concluded, however, that the violation was harmless. It explained that the failure to produce the transcript did not "deter[] counsel for the defense from a thorough cross examination of Agent Bustos" (*ibid.*). Moreover, the court found, "the transcript at issue is essentially duplicative of information disclosed by the government to the defendants prior to trial and the testimony of Agent Bustos during the trial" (*id.* at 4-5). The court also rejected petitioners' *Brady* claim, finding that there was "not a reasonable probability that had the tran-

script of Agent Bustos' testimony been disclosed to the defense in a timely manner, the result of the trial would have been different" (*id.* at 6). The court explained that Agent Bustos was only one of several witnesses who had testified at trial to the same matters described in the grand jury testimony; that the testimony in question was not central to the charge on which petitioners had been convicted; and that the grand jury testimony was merely "a general summary of the events" and not "a detailed account of what occurred" (*id.* at 6-7). "Finally, and most importantly," the court added, there were no "discrepancies of significance between the testimony of Agent Bustos at trial and his summary testimony before the grand jury which would have been particularly helpful to the defense in its efforts * * * to impeach Agent Bustos" (*id.* at 7).

3. The court of appeals affirmed in an unpublished opinion (Pet. App. 1a-12a). It upheld the finding of the district court that "the agent's testimony was in fact substantially consistent in both proceedings" and that a minor discrepancy in the testimony "could not reasonably have affected the jury's assessment of the witnesses' credibility or the outcome of the trial" (*id.* at 7a). The court of appeals also rejected petitioners' claim of prosecutorial misconduct. It concluded that petitioners had failed to "provide a sufficient record on which to review the prosecutor's conduct" and that, in any event, "[t]heir allegations [did] not rise to the level of misconduct requiring reversal" (*id.* at 11a).

ARGUMENT

1. Petitioners contend (Pet. 14-15) that the court of appeals erred in rejecting their Jencks Act claim, stating that " '[t]here are no exceptions to the Jencks rule * * * ' " (Pet. 14 (citations and emphasis omitted)). The court of

appeals did not hold otherwise. It merely concluded that on the record at trial the government's violation of the Jencks Act was harmless. This Court has made clear that a Jencks Act violation is subject to a harmless error standard on appeal. See *Goldberg v. United States*, 425 U.S. 94, 111 n.21 (1976); *Rosenberg v. United States*, 360 U.S. 367, 371 (1959). Petitioners offer no reason to disturb the court of appeals' fact-bound determination that the failure to produce the transcript of Agent Bustos' grand jury testimony "could not reasonably have affected the jury's assessment of the witnesses' credibility or the outcome of the trial" (Pet. App. 7a).

2. Petitioners also provide (Pet. 14-19) a lengthy list of alleged abuses by the government that, in their view, constitute sufficient misconduct to warrant a new trial. The court of appeals correctly rejected that claim, for two reasons.

First, as the court explained (Pet. App. 11a), petitioners failed to provide record references for any of the asserted acts of misconduct. Rules 28(a)(3) and (4) of the Rules of Appellate Procedure require that the statement of the case and argument in an appellant's brief make appropriate references to the record. A court of appeals is "not required to search the record for error" (*Holt v. Sarver*, 442 F.2d 304, 307 (8th Cir. 1971)) and may refuse to entertain an argument that lacks the required record citations (see *McGoldrick Oil Co. v. Campbell, Athey & Zukowski*, 793 F.2d 649, 653 (5th Cir. 1986); *Lemelson v. United States*, 752 F.2d 1538, 1553 (Fed. Cir. 1985); *United States v. Gleason*, 726 F.2d 385, 388 (8th Cir. 1984); *Rebuck v. Vogel*, 713 F.2d 484, 487 (8th Cir. 1983)). In the present case, petitioners filed an opening brief in the court of appeals that lacked any record citations in the statement of facts or in that portion of the argument that catalogued the alleged acts of government misconduct. Indeed, peti-

tioners have repeated that mistake in their petition, making it difficult to determine precisely how the alleged abuses occurred. The court of appeals would have been amply justified in rejecting petitioners' claims for that reason alone.

Second, and in any event, the court of appeals considered petitioners' scattershot list of purported misconduct, and it concluded that the "allegations do not rise to the level of misconduct requiring reversal." Pet. App. 11a. That fact-bound determination warrants no further review.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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SEPTEMBER 1988